SUBJECT INDEX

	Page
Jurisdiction	1
Questions Presented	2
Statement of the Case	2
Argument	4
Conclusion	6
Appendix	9

LIST OF AUTHORITIES

CASES	Page
Brown v. Fowler, 316 S.W.2d 111 (Tex. Civ. App. 1958, error ref. n.r.e.)	3
Hyde Corp. v. Huffines, 314 S.W.2d 763 (Tex. Sup. 1958)	3
United States v. Causby, 328 U.S. 256 (1946)	5

UNITED STATES STATUTES	
28 U.S.C. §1254(1)	1
28 U.S.C. §1292(b)	1
49 U.S.C. §1301	5
49 U.S.C. §1304	5

FEDERAL RULES OF CIVIL PROCEDURE	
Rule 26(b)	2

CODE OF FEDERAL REGULATIONS	
Title 14, Chp. 1, Sec. 1.1	5, 9
Title 14, Chp. 1, Sec. 91.79	4, 9
Title 14, Chp. 1, Sec. 91.85	9

IN THE

Supreme Court of the United States

October Term, 1970

NO. 869

ROLFE CHRISTOPHER, ET AL, *Petitioners*

v.

E. I. duPONT deNEMOURS & COMPANY, INC., *Respondent*

REPLY TO PETITION FOR WRIT OF CERTIORARI

To The Supreme Court Of The United States:

Respondent, E. I. duPont deNemours & Company, Inc., respectfully prays that the Petition for Writ of Certiorari in this matter be in all things denied.

JURISDICTION

The trial court's jurisdiction rested on diversity of citizenship, the Court of Appeals on 28 U.S.C. §1292(b). This Court's jurisdiction may be invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether an owner of land has a cause of action against an aerial photographer deliberately circling above the owner's land to photograph trade secrets of the owner who has exercised reasonable care to protect such trade secrets from discovery.

2. Whether the Court of Appeals correctly affirmed the trial court's denial of Petitioners' Motion for Summary Judgment, and Motion to Dismiss, and correctly remanded the case for further proceedings upon the merits.

STATEMENT OF THE CASE

This lawsuit arises out of Petitioners taking and delivering to an undisclosed third party aerial photographs disclosing Respondent's trade secrets respecting the commercial manufacture of methanol. After Respondent filed its complaint, and before Petitioners filed an answer, oral depositions were taken of the Petitioners, who refused to answer questions relating to the "identity and location" of the persons or firms who engaged them to take these aerial photographs, and to whom they delivered the pictures when printed. The trial court ordered Petitioners to answer such questions under Rule 26(b), Fed. Rules Civ. Proc., and overruled Petitioners' Motion to Dismiss and Motion for Summary Judgment.

Respondent has not yet answered the complaint in the trial court. There has been no trial and the trial court has not made any findings of fact or entered any final order.

The Court of Appeals affirmed the interlocutory order directing further discovery and denying the Motions to

Dismiss and for Summary Judgment, and remanded the case for further proceedings in the trial court.

Respondent exercised extreme caution in the protection of its trade secrets which were being embodied in the construction of a new methanol manufacturing facility near Beaumont, Texas. Discovery of these trade secrets could only be had by aerial photography. Petitioners hired an airplane, circled several times over Respondent's plant site at an altitude of about 500 feet, photographed the trade secrets, developed the films and delivered the prints to the undisclosed principal who had employed them to make the photographs in question.

Suit was brought to recover the photographs, for injunctive relief, and for damages from the acquisition and publication of Respondent's trade secrets. One of the Petitioners acknowledged that they refused to disclose the identity of their principal upon deposition only because he "doesn't want me to reveal it". The undisclosed principal agreed "to take care of" the expense of the litigation.

Consonant with the Restatement of the Law of Torts, Sections 757 and 759, and analogous Texas cases, *Hyde Corp. v. Huffines,* 314 S.W.2d 763 (Tex. Sup. 1958); *Brown v. Fowler,* 316 S.W.2d 111 (Tex. Civ. App. 1958, error ref. n.r.e.), on appeal from the trial court's interlocutory order, the Court of Appeals held, on a test of the complaint against the Motion to Dismiss, that the acquisition of a trade secret by aerial photography was "improper" within the meaning of the Restatement and that a cause of action lies therefor.

ARGUMENT

However cast, at this stage of the proceeding, we are dealing with a case:

(1) of diversity jurisdiction;

(2) where review is sought of an interlocutory order compelling discovery and denying a motion for summary judgment and to dismiss a complaint;

(3) wherein there is no asserted conflict with a state decision, state law, a federal decision or federal law;

(4) wherein Petitioners do not even assert the rudimentary bases for the granting of a petition for certiorari under this Court's Rule 19(1)(b).

Even though there has been no finding in this respect, Petitioners contend the photographs were taken from the "public air space", "at an altitude greater than minimum safe altitude of flight as defined by regulations of the F.A.A." (Page 2 of Petition).

This was a rigorously disputed fact issue rendered immaterial by the Court of Appeals. However, there is ample proof by affidavit and deposition that the flight was at an altitude of 500 to 800 feet over an area wherein there were structures 100 to 300 feet in height, 1000 people working and "literally hundreds" of automobiles parked. Any one of these conditions would render the flight violative of the F.A.A. regulation Sec. 91.79, General Operating and Flight Rules to which Petitioners refer, and deprive Petitioners of their claimed right of transit over Respondent's property.

Furthermore, Respondent's plant site is within a five-mile radius of the Jefferson County Airport, and within the "airport traffic area" (A. 210).[1] Yet, there is nothing other than hearsay testimony on discovery proceedings that permission for this flight had been granted by the Tower Control at Jefferson County Airport.[2] Title 14, Chapter 1, Section 1.1, and Section 91.84, Code of Federal Regulations, prohibits such flight without prior permission of "air traffic control". See Appendix hereto.

Whether the photographs in fact were or were not taken from within the public air space is subject to resolution on a trial of this matter.

Petitioners contend "This decision destroys Petitioners' liberty to use the public air space and freedom to practice their profession in a lawful manner. It is a ruling affecting the right of every citizen to use the public space". (Pages 3-4 of Petition).

In truth, the Court will note that while there is defined navigable air space (49 U.S.C. §1301), the Congressional declaration enunciates for United States citizens[3] only a "public right of freedom of transit" therein. 49 U.S.C. §1304. Likewise, this Court in *United States v. Causby*, 328 U.S. 256 (1946) referred to this navigable

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1. "Airport traffic area" means, * * * that air space within a horizontal radius of 5 statute miles from the geographical center of any airport at which a control tower is operating, extending from the surface up to but not including 2000 feet above the surface. Title 14, Chap. 1, Sec. 1.1, C.F.R.

2. This issue is still unresolved because all discovery proceedings were stayed by the trial court pending interlocutory appeal.

3. In this immature record, there is no showing plaintiffs are citizens.

air space as a "public highway" for "flight", saying nothing about its use for the surreptitious appropriation of trade secrets.

Petitioners are not denied freedom of transit, the liberty to use the air space or the opportunity to practice their profession in a lawful manner. By the decision below, after the matter is finally tried, they may be circumscribed in their "improper" acquisition and disclosure of trade secrets. This holding follows precisely the Restatement of Torts, and is consonant with the Texas Courts observations:

> "* * * the undoubted tendency of the law has been to recognize and enforce higher standards of commercial morality in the business world". *Hyde v. Huffines*, 314 S.W.2d 763, 773 (Tex. Sup. 1958).
>
> "The fact that (a trade secret) may be discovered by fair means does not deprive the owner of his right to protection from one who secures the knowledge by unfair means. The question is not, 'How could he have secured the knowledge?', but, 'How did he?' ". *Brown v. Fowler*, 315 S.W.2d 111, 114 (Tex. Civ. App. 1958, error ref. n.r.e.).
>
> Section 759 of the Restatement of Torts says:
>
> "One who, for the purpose of advancing a rival business interest, procures by *improper means* information about another's business is liable to the other for the harm caused by his possession, disclosure or use of the information".

Whether to prevent unjust enrichment[4] or the fruits of

4. *Meier Glass Co. v. Anchor Hocking Glass Corp.*, 94 F.Supp. 264, 268 (W.D. Penn. 1951).

"intrustion",[5] the Court of Appeals did not allow the surreptitious expropriator of a trade secret to be insulated from liability,[6] declaring that aerial photography of such secrets was "improper" and that a cause of action lies therefor.

CONCLUSION

Since this is a correct decision upon an interlocutory order in conflict with none other, Respondent prays that the Petition for Certiorari be in all things denied, whereupon a trial may be had.

Respectfully submitted,

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5. Prosser, *Privacy*, 48 Calif. Law Rev. 383, 389-392 (1960).

6. *Seismograph Service Corp. v. Offshore Raydist.*, 135 F.Supp. 342, 354 (E.D. La. 1955).

APPENDIX

Title 14, Chp. 1, Sec. 1.1, C.F.R.:

"'Airport traffic area' means, unless otherwise specifically designated in Part 93, that airspace within a horizontal radius of 5 statute miles from the geographical center of any airport at which a control tower is operating extending from the surface up to, but not including, 2,000 feet above the surface."

Title 14, Chp. 1, Sec. 91.79, C.F.R.:

"§91.79 Minimum safe altitudes; general.

"Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

"(a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

"(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

"(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure."

Title 14, Chp. 1, Sec. 91.85, C.F.R.:

§91.85 Operating on or in the vicinity of an airport; general rules.

"(a) Unless otherwise required by Part 93 of this chapter, each person operating an aircraft on or in

the vicinity of an airport shall comply with the requirements of this section and of §§91.87 and 91.89.

"(b) Unless otherwise authorized or required by ATC, no person may operate an aircraft within an airport traffic area except for the purpose of landing at or taking off from, an airport within that area. ATC authorizations may be given as individual approval of specific operations or may be contained in written agreements between airport users and the tower concerned."